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IN THE

Supreme Court of the United States

OCTOBER TERM, ~~1918~~ 1919

Nos. ~~299-304~~ 4 — 7

THE UNITED STATES, *Petitioner*
vs.
GERLACH LIVE STOCK COMPANY (a corporation)

THE UNITED STATES, *Petitioner*
vs.
J. SHELDON POTTER

THE UNITED STATES, *Petitioner*
vs.
MARTIN ERRECA

THE UNITED STATES, *Petitioner*
vs.
JAMES J. STEVINSON (a corporation)

THE UNITED STATES, *Petitioner*
vs.
ARCHIBALD J. STEVINSON

THE UNITED STATES, *Petitioner*
vs.
3-H SECURITIES COMPANY

On Certiorari to the Court of Claims.

BRIEF FOR RESPONDENTS.

EDWARD F. TREADWELL,
REGINALD S. LAUGHLIN,
Mills Building, San Francisco 4, California
Attorneys for Respondents.

Subject Index

	Page
Opinion below and jurisdiction	1
Statement of the cases	2
Navigation	8
Findings	9
Argument	12
I. The primary purpose of the Friant dam and canals leading therefrom is the irrigation of privately owned non-riparian lands, and it has no substantial effect on navigation or flood control	12
II. Even if the project was to any extent in aid of navigation or flood control, it is clear from both the state and federal history of the project and the terms of the plan itself that Congress did not intend to rely upon that fact to enable it to destroy vested rights of riparian owners without compensation, but on the contrary expressly provided for compensation to the riparian owners of both cultivated lands and grasslands	25
III. The acts of the defendant in closing the dam and impounding 17,400 acre feet of water in October, 1941, constituted a taking of plaintiffs' rights	29
IV. The court was fully justified in awarding interest from October 20, 1941, to date of payment	31
V. The findings as to the right taken were sufficient	32
VI. The ruling of the court of claims that the California constitutional amendment in no way deprived the plaintiffs of their right to compensation for depreciation in value of their land by the taking of all the water of the river, was fully justified	32
VII. The court of claims did not misinterpret the exceptions and reservations contained in the Potter, Erreca and Gerlach Live Stock Company deeds	41
Potter deed	42
Erreca deed	43
Gerlach deed	45

Table of Authorities Cited

Cases	Pages
Barataria v. Ott, 84 Miss. 737, 37 South. 121	48
Brooks v. Dewar, 313 U.S. 354, 360-361	19
Chidester et al. v. City of Newark et al., 31 F. Supp. 892	48
City of Elsinore v. Temescal Water Company, 36 C. A. (2d) 116	40
City of Lodi v. East Bay Municipal Utility District, 7 Cal. (2d) 316	38
Collier v. Merced Irrigation District, 213 Cal. 554	30
Dyer v. Sanford, 9 Metc. 395, 43 Am. Dec. 399	48
East Bay Municipal Utility District v. City of Lodi, 120 Cal. App. 740, 762	13, 31
Gallatin v. Corning Irrigation District, 163 Cal. 405	34
Gerlach v. U. S., 102 Ct. Cls. 392	14
Gin S. Chow v. Santa Barbara, 217 Cal. 673	34
Henry Ford & Son v. Little Falls Fibre Company, 280 U.S. 369	25
Herminghaus v. Southern Cal. Edison Co., 200 Cal. 81 (Certiorari Dismissed 275 U.S. 486)	15
Hill v. Cutting, 107 Mass. 596	48
Hillside Water Company v. City of Los Angeles, 10 Cal. (2d) 677	38
Jackson v. United States, 230 U.S. 1, 18	15
Livermore v. Beal, 18 C. A. (2d) 535, 540-1	15
Los Angeles County Flood Control District v. Abbot, 24 C. A. (2d) 728	39
Meridian Ltd. v. The City and County of San Francisco, 13 Cal. (2d) 424	39
Montecito Valley Water Company v. Santa Barbara, 144 Cal. 578	36
Mott v. Nardo, 73 C. A. (2d) 159, 166 P. (2d) 37	48

Pages

Peabody v. Vallejo, 2 Cal. (2d) 351 35
Powell v. Big Horn Low Line Ditch Co., 81 Mont. 430, 263 Pac. 692 48

Silas Mason Co. v. Tax Comm., 302 U.S. 186, 208 26

United States v. Central Stockholders, 43 F. (2d) 977, 53 F. (2d) 322 15
United States v. Dickinson, 331 U.S. 745 29

Village of Terrace Park et al. v. Errett, 12 F. (2d) 240 48

Williams v. City and County of San Francisco, 24 C. A. (2d) 630 40

Miscellaneous

Act of December 5, 1924 (43 Stat. 702) ..... App. i, ii

California Constitutional Amendment, Nov. 6, 1928, Art. XIV, Sec. 3 32

California State Bulletin No. 25 14

California Statutes, 1943, p. 1747 22

Central Valley Project Act (Cal. Stats. 1933, p. 2643) 15, 22

Feasibility Report, H. Doc. 146, 80th Cong., 1st Sess., pp. 12, 14 18

Flood Control Act of December 22, 1944, Sec. 1(b), 58 Stat. 887 26

Hearings before the Committee on Flood Control, House of Representatives, Seventy-Fourth Congress, First Session, Central Valley Project of State Water Plan of California 19

Hearings before House Committee on Appropriations:

pages 281-282 18
page 349 18
pages 421-422 19
Inferior Department, 74th Cong., 2nd Sess., pp. 179-181 19
Interior Department, 79th Cong., 1st Sess., p. 1200 ... 19

Pages

Hearings on the Interior Department Appropriation Bill for 1938, Part 2, pp. 1588, 1605 and 1616 20

H. Com. on Flood Control, Doc. No. 2, 78th Cong., 2d Sess. 22

House Document No. 332, 65th Congress, First Session:
page 13 15
page 38, paragraph 55 16

House Document No. 791, 71st Congress, Third Session, dated February 27, 1931, pp. 6, 8, 13 and 19 16

House Report 161, 76th Cong. 1st Sess. p. 16 18

House Report 786, 75th Cong. 1st Sess., p. 15 18

House Report 1855, 75th Cong., 3rd Sess., p. 14 18

Interior Department Appropriation Act for fiscal year 1938, 50 Stat. 597 18

Interior Department Appropriation Act for fiscal year 1939, 52 Stat. 291 18

Interior Department Appropriation Act for fiscal year 1940, 53 Stat. 685 18

Letter from the Commissioner of the Reclamation Bureau ..... App. xvi

Plan of the Central Valley Project ..... App. i

Rivers and Harbors Act of August 26, 1937 (50 Stat. 844, 850) 14, 17

Rivers and Harbors Document Numbered 35, Seventy-Third Congress 17

Stanford Law Review, Vol. 1, p. 172 34

Stats. Cal. 1933, p. 2643 at p. 2651, Sec. 11 ..... 15, 22

50 Stats. 844, 850 14

54 Stats. 1198 14

Tucker Act, 62 Stat. 992, 28 U.S.C.A., Sec. 2401 29

Water Right Purchase Agreement between the United States and Miller & Lux Incorporated ..... App. xv

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OPINION BELOW AND JURISDICTION.

These are adequately covered by the petition (p. 2).

STATEMENT OF THE CASES.

The average yearly flow of the San Joaquin River is 1,811,082 acre feet (R., p. 85). Prior to any of the proceedings of the government involved in these cases, 1,458,538 acre feet of this water had been utilized by controlled irrigation (R., p. 84). Besides this, 246,000 acre feet were beneficially used by uncontrolled flow over 82,000 acres of grass lands, using 3 acre feet per acre, or 246,000 acre feet (R., pp. 88-9). This indicates a total beneficial use of 1,704,538 acre feet of water, which is almost equal to the average annual flow of the river. The record further shows that this water was used on 285,000 acres of crop lands (R., p. 93) and 250,000 acres of submarginal or grass lands (Appendix, p. viii), making a total yearly benefit to 535,000 acres of land. Prior to any of the proceedings by the government herein Madera Irrigation District, a public body under the laws of California, filed applications for the appropriation of large amounts of water from the San Joaquin River to be stored at a *point known as Friant, and to be used for the irrigation* of land in Madera County. In connection with this matter, litigation arose between that District and Miller & Lux Incorporated and other corporations owning land riparian to the river and appropriations from the river, in which a decree was entered on January 4, 1933, adjudging the riparian character of the lands of Miller & Lux Incorporated, including the lands of the plaintiffs in the Gerlach, Potter and Erreca cases, that the waters of the river overflowed and percolated into the land, that the high and flood flows of the river in the winter, spring and summer,

were highly beneficial for the production of grass and pasture, and that all of the water of the river, including the high and flood flow in the winter, spring and summer, was part of the natural and ordinary flow of the river to which Miller & Lux Incorporated was entitled, with the exception of flows in excess of 20,000 second feet at any one time, or in excess of 3,000,000 acre feet in any one year, and that flows in excess of those amounts are infrequent, extraordinary and unusual and not a part of the regular and customary flow of the water of the river; that the appropriation by the Madera Irrigation District was invalid and ineffective as against the rights of Miller & Lux; and the landowners were entitled to the full flow of the stream for the purpose of fertilizing and irrigating the lands, except with respect to flows in excess of 20,000 second feet at any one time, or in excess of 3,000,000 acre feet in any one year, (R., Finding 17, pp. 79-81).

It should be noted that the above-named plaintiffs are successors in interest of Miller & Lux with respect to the land in question and the United States of America is successor in interest of Madera Irrigation District (R., pp. 78-9).

Each of the actions here involved is to recover compensation for the taking by the government of all of the water of the San Joaquin River flowing at Friant above the lands of plaintiffs for the irrigation of privately-owned non-riparian lands in Madera, Fresno, Tulare, Kings and Kern Counties, California. Each petition alleges that that is the plan of the District,

and further alleges that the plan had been so far carried out that on the 20th day of October, 1941, the government began the storage of the water of the river and at that time took all of the riparian rights of the plaintiffs (R., pp. 1, 37, 43, 148, 154 and 157). It will be noted that what the plaintiffs are suing for is the taking of plaintiffs' rights to water their lands riparian to the river in order to water other lands not riparian to the river.

The central portion of California is composed of two valleys, one the Sacramento Valley traversed by the Sacramento River system flowing south to San Francisco Bay, and the San Joaquin Valley traversed by the San Joaquin River system flowing northerly into the San Francisco Bay. These combined valleys are referred to as the Central Valley of California (R. 71). The United States in 1935 approved a plan to be carried out by the Reclamation Bureau for the utilization of the waters of these streams in the following manner: The basic principle of the plan was that there was more water in the Sacramento Valley than was needed for the irrigation of the land in that valley, and insufficient water in the San Joaquin Valley for the irrigation of land in that valley. It was therefore planned that a reservoir should be constructed in the upper reaches of the Sacramento Valley to store the water of the Sacramento River, to be known as Shasta Dam, and to use that water for three purposes: (1) The production of power which could be used to raise the water into the San Joaquin Valley; (2) to furnish a supply of water at the junc-

tion of the Sacramento River and Carquinez Straits so as to prevent incursion of salt water into the delta of the Sacramento and San Joaquin Rivers; and (3) to supply water which could be pumped up the San Joaquin River to supply the *cultivated* lands in the San Joaquin Valley which would be deprived of the water of the San Joaquin River. It was also planned to construct a reservoir in the San Joaquin Valley in the upper reaches of the San Joaquin River at a point known as Friant, at which point all the water of the San Joaquin River there flowing would be reservoired and diverted through two canals, one known as the Madera Canal and flowing northerly, and another known as the Kern Canal and flowing southerly, to be used on land non-riparian to the San Joaquin River. This plan was approved by the President on the 2nd day of December, 1935 (R., p. 91; Supp. p. i). The plan further contemplated that all of the *cultivated* lands theretofore irrigated by the waters of the San Joaquin River would thereafter be irrigated by waters pumped from the Sacramento Valley and that arrangements would be made with the owners of such land for such exchange of waters. So far as the *uncultivated grass* lands theretofore watered by the waters of the San Joaquin River were concerned, their irrigation was to be discontinued and the government was to purchase or otherwise acquire the rights of such lands in the water of the San Joaquin River (R. pp. 94-5).

While this plan is set forth in considerable detail in the findings, the complete plan is not therein set

forth, and as we deem it a document of which the Court takes judicial notice, we have attached the full plan in an appendix hereto (Appendix, p. i).

The Bureau of Reclamation immediately proceeded to purchase under contracts with the grass land owners their rights in the river and to compensate them for the taking of the water (R. pp. 95-8). One of the largest grass land owners was Miller & Lux Incorporated, which owned, either in its own name or through subsidiary corporations many thousands of acres of crop or cultivated lands and grass lands. The government entered into two contracts with Miller & Lux Incorporated, one providing for the acquisition by the government of all of the rights of that Company and its subsidiaries to water from the San Joaquin River, in exchange for an agreement to furnish them with a like quantity of water from the Sacramento River, and providing for furnishing to them from the San Joaquin River water for the crop lands until the government was able to deliver water from the Sacramento River, and agreeing to pay Miller & Lux $2,450,000 for depriving their grass lands of the water of the San Joaquin River. These grass lands were of two types, one type irrigated by controlled flows, and one type watered by uncontrolled flows of the river and its channels. This $2,450,000 was arrived at by allowing $13.00 an acre for the land subject to controlled flows and $9.00 an acre for land subject to uncontrolled flows (R. p. 97).

All of the lands of plaintiffs Potter, Erreca and Gerlach Live Stock Company were covered by this

contract, but the contract provided that money applicable to this land should be deposited in escrow and paid to Miller & Lux Incorporated six years after the first diversion of water unless before that time action had been instituted by others in the Court of Claims of the United States for such compensation (R. pp. 96-7).

Prior to that time Miller & Lux Incorporated had deeded the land involved in Potter case No. 46245 to Potter (R. pp. 104-10) and the land involved in Gerlach case No. 46009 to Gerlach Live Stock Company (R. pp. 125-8) and had entered into written contracts for the sale of the land involved in Erreca case No. 46244 to Martin Erreca (R. pp. 111-13). These deeds and contracts of sale all recognized that the riparian rights of these lands were conveyed with the land, subject, however, to certain vested rights of Miller & Lux Incorporated and its subsidiary corporations, which were protected by certain exceptions, reservations and conditions.

In the three cases of James J. Stevinson, a corporation, Archibald J. Stevinson and 3-H Securities Company, the plaintiffs were the owners of riparian lands near the junction of the San Joaquin River and the Merced River. The Court held that all this land was riparian, and in fixing the damages the Court used the same $9.00 an acre unit value applied in the Miller & Lux contract to uncontrolled overflow lands (R. pp. 185-91).

The owner of these lands, James J. Stevinson, a corporation, had entered into contracts by which its

riparian rights were preserved, but the rights of the land were subordinated to certain specified rights of Miller & Lux Incorporated and its subsidiary corporations. The lands, therefore, involved in these cases were, like the lands acquired from Miller & Lux Incorporated, only entitled to the surplus water after the superior rights were supplied (R. pp. 163-8).

NAVIGATION.

The government by demurrer raised the contention that the Central Valley Project was also in aid of navigation and that therefore plaintiffs could not recover compensation. The Court of Claims, in overruling this demurrer, held that there was no governmental declaration that the taking of all the water of the San Joaquin River for irrigation was in aid of navigation, and that it was obvious that to completely dry up the river could not be in aid of navigation. The defendant in its answer, did not make any contention that the taking of the water for the purpose alleged in the petition was in aid of navigation, nor did it on the trial introduce any evidence to that effect (R. pp. 103-4).

FINDINGS.

The petitioner has not brought up the evidence in the cases, so the cases are entirely controlled by the findings. The Court of Claims, among other things, found:

1. "Prior to December 2, 1935, the defendant, through the Bureau of Reclamation, Department of the Interior, formulated a project for the irrigation of a large area of privately owned land nonriparian to the river, situated both to the north and south of Friant in the counties of Madera, Merced, Fresno, Tulare, Kings and Kern in the State of California * * *" (Finding 32, R. p. 90).

2. "The plan contemplated that the United States would acquire all existing rights to the use, diversion, and storage of the waters of the San Joaquin River flowing at Friant." (Finding 32, R. p. 91).

3. The water of the Sacramento River would be carried for 150 miles and lifted 150 feet in order to supply the crop lands theretofore irrigated on the San Joaquin River, and that "This water will replace San Joaquin River water now used for irrigation in the northern San Joaquin Valley, thus permitting *the entire flow* of the San Joaquin River to be regulated in Friant Reservoir—the second storage unit of the Project—and to be utilized in the southern San Joaquin Valley where local supplies are deficient. Water from this reservoir will be delivered by gravity through conduits extending northerly and southerly to serve developed irrigated lands in an area extending from Madera County on the north to Kern County on the south" (R. pp. 91-2).

4. "Defendant's Plan, as modified, contemplated that the United States should eventually store and divert to non-riparian use all the wat-

ers of the San Joaquin River flowing at Friant, except for occasional spills" (Finding 35, R. p. 94).

5. "Defendant's Plan contemplated that compensation for the acquisition of the right to the use of water on crop lands would be made by providing a substitute supply of water from the Sacramento River through the pumping system. Pending the construction and completion of the pumping system, the plan contemplated that sufficient water would be released from the Friant Reservoir to meet the requirements of the crop land rights" (Finding 35, R. pp. 94-5).

6. "The Plan contemplated that the grassland rights and the riparian rights were to be purchased or otherwise acquired by the defendant, and the riparian rights extinguished" (Finding 35, R. p. 95).

7. "the defendant agreed to pay to Miller & Lux Incorporated and its subsidiaries the sum of $2,450,000 for the water rights so to be conveyed. The defendant arrived at this amount on the basis of the appraisals of its board, which fixed an average price of approximately $13 per acre for the appropriative and prescriptive controlled grassland rights and approximately $9 per acre for the riparian rights of uncontrolled grasslands" (Finding 37, R. pp. 95-96).

8. That the plaintiffs' lands were regularly overflowed by the waters of the San Joaquin River and that this overflow was beneficial (R. p. 71).

9. That this overflow was ordinary and usual (R. p. 72).

10. That the value of the riparian lands depends, among other factors, on the quantity of such overflow (R. p. 84).

11. That this overflow water was part of the regular and natural flow of the stream (R. p. 172).

12. That while some of this water flowed past the lands of the plaintiffs and the surplus goes eventually to the San Francisco Bay, it was useful in preventing the encroachment of salt water into the San Joaquin delta (R. p. 88).

13. That the use of 3 acre feet per acre by overflow was a reasonable use (R. p. 88).

14. That the overflow water affects the market value of the land (R. p. 88).

15. That there were water rights on the river of an undefined character below the lands of plaintiffs (R. p. 88).

16. That the government Plan was to take all the water of the river (R. p. 90).

17. That the water taken by the government was to be used for irrigation (R. p. 92).

18. That it was the Plan of the government to give a substituted supply of water of a million acre feet of water for 285,000 acres of cultivated lands (R. p. 93).

19. This overflow increased the grasses on the land (R. p. 87).

20. That the Plan contemplated that water for 250,000 acres of submarginal lands should be purchased (R. p. 93).

21. That all the water to be taken by the government was to be taken for non-riparian lands (R. p. 94).

22. That the government was to acquire all rights to water on the river (R. p. 94).

23. That the plan contemplated a substituted supply for crop lands (R. p. 94).

24. The plan contemplated that grass land rights and riparian rights should be purchased or otherwise acquired and the riparian rights extinguished (R. p. 95).

25. No evidence was introduced of any improvement to navigation of the San Joaquin River by the Project. On the contrary, it appeared that in thirty-six years out of forty-eight years the Project would dry up the river (R. p. 103).

26. The amounts awarded to the plaintiffs were the differences between the value of the overflowed lands with and without their riparian rights (R. pp. 110, 113, 128, 188 and 190-1).

ARGUMENT.

I.

THE PRIMARY PURPOSE OF THE FRIANT DAM AND CANALS LEADING THEREFROM IS THE IRRIGATION OF PRIVATELY OWNED NON-RIPARIAN LANDS, AND IT HAS NO SUBSTANTIAL EFFECT ON NAVIGATION OR FLOOD CONTROL.

It is obvious from a reading of the Plan itself that there was no intent to construct Friant dam for any

purpose other than for the irrigation of lands in the southern portion of the San Joaquin Valley. That is what the Government said by the Plan it was to do and that was in no way changed up to the time of the taking, which became the basis of these actions. Later, apparently, it was suggested that the dam might be operated so there would be "occasional spills". The record is not clear as to what is meant by "occasional spills" as having any relation to flood control; but we assume in favor of the Government that it means that at certain times the reservoir might be filled to capacity, possibly in the winter, and in order to take care of later floods some water might be permitted to spill out of the reservoir so as to leave room for storage of later floods, and thus affect flood control. The fact still remains, however, that the Government, under its Plan, had already acquired the right to take all of the water out of the river for the benefit of irrigation. It has not waived that right or obligated itself not to use all the water for that purpose, and the mere statement of an intent to make occasional spills cannot affect the right of the plaintiffs to compensation for the thing that was taken from them.

East Bay Municipal Utility District v. City of Lodi, 120 Cal. App. 740, 762.

The correctness of our contention that there is no substantial aid to navigation or flood control, so far as the San Joaquin River is concerned, is shown by the following:

(1) The Central Valley Project consisted of the storage of the water of the *Sacramento River* and the use of it in aid of navigation on the Sacramento River and for irrigation and power, and the storage of the water of the *San Joaquin River* and the use of all of it for irrigation and made no provision for the use of any of the water of the San Joaquin River in aid of navigation (Appendix pp. iii, v, ix);

(2) The only Congressional declaration prior to the taking was that the *Central Valley Project* was in aid of navigation (50 Stats. 844, 850; 54 Stats. 1198);

(3) The Court of Claims on demurrer construed the Congressional declarations as applying to that part of the Plan that related to the water of the Sacramento River and not as declarations that the taking of all the water of the San Joaquin River for irrigation was in aid of navigation (*Gerlach v. U. S.*, 102 Ct. Cls. 392);

(4) The defendant in its answer set up no easement or other right of the Government in the water of the San Joaquin River (R., pp. 26, 52, 154, 160);

(5) The defendant on the trial offered no evidence that the storage or diversion of water of the San Joaquin River was in aid of navigation (R., pp. 103-104);

(6) The Plan was first formulated by the State of California and State Bulletin No. 25 stated:

> "Dependence upon eminent domain offers the only certain expedient in dealing with the riparian objector";

(7) The Act of the Legislature of California regarding the Project (Stats. Cal. 1933, p. 2643 at p. 2651, Sec. 11) provided:

> "In no other way than by purchase or otherwise as in this act provided shall said water rights as herein defined, of said watershed, area or the inhabitants be impaired or curtailed";

(8) The Supreme Court of California had held that the water of the San Joaquin River was used primarily for irrigation and the storage thereof was not in aid of navigation (*Herminghaus v. Southern Cal. Edison Co.*, 200 Cal. 81 (Certiorari Dismissed 275 U.S. 486));

(9) The United States Courts for California in *United States v. Central Stockholders*, 43 F. (2d) 977, 52 F. (2d) 322, had decided that storage on that river was not in aid of navigation;

(10) In House Document No. 332, 65th Congress, First Session, page 13,[1] it was stated in regard to the San Joaquin River:

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[1]In this brief we shall refer to many Governmental Reports, Plans, etc., which are not in the record as filed in this Court, except to the extent that they are recited in the findings. The Court takes judicial notice of such documents (*Jackson v. United States*, 230 U.S. 1, 18). We shall also refer to many official acts of the President, the Reclamation Bureau, or the Secretary of the Interior, which are not in the record as filed in this Court. Of these we likewise believe that the Court takes judicial notice (*Livermore v. Beal*, 18 C.A. (2d) 535, 540-1). We are attaching as an appendix a full copy of the Plan of the Central Valley Project, which is in part recited in the findings, portions of the water right purchase agreement between the United States and Miller & Lux Incorporated and a letter from the Commissioner of the Reclamation Bureau stating the policy to make compensation.

"It is believed that full use will be made for purposes of irrigation of all the water that can be so stored, and that no assistance to navigation can be expected from such sources.";

(11) In House Document No. 332, 65th Congress, First Session, paragraph 55, page 38, it was stated in regard to the San Joaquin River:

"the hope that better irrigation practices would make available more water for navigation use is futile.";

(12) House Document No. 791, 71st Congress, Third Session, dated February 27, 1931, contained the report of Lytle Brown, Major General, Chief of Engineers, to the Secretary of War, in which it was stated:

"5. * * * *Further improvement above Stockton would require canalization, and the cost would be substantially in excess of the anticipated benefits.*" (p. 6).

"12. * * * *the Friant Reservoir would serve chiefly power development and irrigation.*" (p. 8).

"26. *The Friant project will not benefit navigation, and no Federal contribution to that project appears justified.*" (p. 13);

(13) In House Document No. 791, page 19, being the Report of Herbert Deakyne, Colonel, Corps of Engineers, to the Chief Engineers, it was stated in paragraph 19:

"The division engineer has considered the further improvement of the river above Stockton to Mendota, 175 miles. *He advises that because of*

the great need of water for irrigation it is impracticable to increase the low water flow by reservoirs sufficiently to provide a dependable channel for navigation.";[2]

(14) The Plan itself expressly provided for compensating all persons having water rights on the San Joaquin River for the irrigation of cultivated lands, by exchanging their rights in the San Joaquin River for water brought to them by the Project from the Sacramento River, and expressly provided for the purchase or condemnation of all rights in the San Joaquin River for irrigation of uncultivated or grasslands (Appendix, pp. iii, v, viii);

(15) The Plan for the Central Valley Project was embodied in Rivers and Harbors Document Numbered 35, Seventy-third Congress (Appendix, p. i), and as we have pointed out provided for compensation for all water rights, and this Plan was expressly authorized by Section 2 of the Rivers and Harbors Act of August 26, 1937 (50 Stat. 844, 850), set forth on page 4 of the Petition for Writs of Certiorari herein.

(16) The Bureau of Reclamation immediately after the inauguration of the Plan entered into an exchange agreement with those having water rights for cultivated lands on the San Joaquin River aggregating over 1,000,000 acre feet of water[3] and also

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[2]Italics added in paragraphs 11-13.

[3]The 285,000 acres for which over 1,000,000 acre feet of water are to be exchanged (R. p. 93) all have water rights for cultivated lands. There is no evidence in the record of the value of those water rights, but the cost of the San Joaquin Pumping System which is designed to furnish a substituted water supply for the land, is

purchased from Miller & Lux Incorporated its water rights for uncultivated or grass lands for a price aggregating $2,450,000, all of which sum was paid by appropriations by Congress with the exception of amounts aggregating $511,350, which latter sum was paid from appropriations made by Congress into an escrow to be paid to Miller & Lux Incorporated, unless some other person should prove a better right thereto in some action commenced within six years after the initial storage at Friant Dam (R. 95-98);

(17) Feasibility Report, H. Doc. 146, 80th Cong., 1st Sess., pp. 12, 14, indicates that about $5,000,000 had been paid for water rights along the San Joaquin River by January 31, 1946, including $842,000 for the water rights of Chowchilla Lands, Inc. This does not include the 1,000,000 acre feet of water which is to be paid for by furnishing another water supply.[4]

$19,000,000. (Appendix p. vi.) This does not include any part of the cost of Kennett Dam, transmission line and substation estimated at $98,000,000 (Appendix p. vi) or the cost of perpetually maintaining the pumping system and carrying the water to the land, all of which are useful in creating the substituted water supply. All of this has been given by the Government in exchange for the water of San Joaquin River to which this land was entitled, and which the Government now claims it could have taken without compensation. On the other hand the amount awarded the plaintiffs in the cases at bar was only $94,355.26 of which $67,283.26 has already been paid by the Government into the escrow, leaving only $27,072 and interest to be paid by the Government.

[4]These payments were made with the full knowledge of Congress. See eg. Interior Department Appropriation Act for fiscal year 1938, 50 Stat. 597; House Report 786, 75th Cong. 1st Sess. p. 15; Hearings before House Committee on Appropriations, pp. 281-282; Interior Department Appropriation Act for fiscal year 1939, 52 Stat. 291; House Report 1855, 75th Cong., 3rd Sess. p. 14; Hearings before House Committee on Appropriations, p. 349; Interior Department Appropriation Act for fiscal year 1940, 53 Stat. 685; House Report 161, 76th Cong. 1st Sess. p. 16; Hearings before

(18) The evidence showed that all the water of the San Joaquin River was taken by the Government for irrigation of non-riparian lands in the Counties of Madera, Merced, Fresno, Tulare, Kings and Kern, California (R., p. 90);

(19) In the document entitled "Hearings before the Committee on Flood Control, House of Representatives, Seventy-Fourth Congress, First Session, Central Valley Project of State Water Plan of California" held on February 7, 8 and 9, 1935, the following took place:

> "Mr. Zimmerman. Is there any navigation at all on the San Joaquin River?" (p. 70)
>
> "Mr. Hyatt. Not far above Stockton. There is really none on the river above tidewater." (p. 71)
>
> * * * * * * *
>
> "Mr. Wallgren. Would this money be expended to make the San Joaquin navigable?
>
> Mr. Hyatt. No. We advanced that idea to the War Department but they deferred it. It is not in this plan.
>
> Mr. Wallgren. The navigation feature in this bill applies to the Sacramento only?
>
> Mr. Hyatt. Yes, sir." (p. 72)

(20) On the hearings on the Interior Department Appropriation Bill for 1938 the appropriation for the Central Valley Project was considered and in Part 2,

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House Committee on Appropriations, pp. 421-422; see generally, Hearings before the House Committee on Appropriations, Interior Department, 74th Cong. 2nd Sess., pp. 179-181; Hearings before House Committee on Appropriations, Interior Department, 79 Cong. 1st Sess. p. 1200. See *Brooks v. Dewar*, 313 U.S. 354, 360-361.

page 1588, Mr. Hyatt (State Engineer of California), after sketching the purposes of the Kennett Dam on the Sacramento River, including the improvement of navigation on that River, stated:

> "Another dam will be built on the San Joaquin River, right back of the city of Fresno. This is called the Friant Reservoir, and from that, large-sized canals will be built north and south, to serve the million acres which is in distress in the San Joaquin Valley.
>
> The project involves the purchasing of water rights on second-class land, pasture land, so that its immediate effect will be to retire 250,000 acres of submarginal land which is now being irrigated."

On page 1605, Representative Buck stated:

> "Now, it has taken a long time, seemingly, to go out and negotiate with the owners of the water rights along the river, because this water in California is subject to two laws: Appropriation, which is the general law of the West, and riparian rights, which are also recognized in California. Both of them have to be taken into consideration, and in many cases, both kinds of owners have to be compensated, in order to secure the rights for the Friant Dam and for the other reservoirs that may be built.
>
> I am advised that those negotiations are practically at an end."

And on page 1616 Mr. Hyatt stated:

> "I think, in actual cash, this amount will be required for payments to the contractors for the

purchase of water rights and rights-of-way, before the end of the fiscal year 1938."

(21) Before the Dam was constructed the Commissioner of the Bureau of Reclamation gave written assurance to the landowners that

> "The policy of the Government is to compensate equitably those whose property rights will be adversely affected as a result of the construction of Friant Dam." (Appendix, p. xvi.)

As we pointed out, the original Plan made no reference to navigation or flood control so far as Friant Dam was concerned. However, the Court found that there had been a modification of the Plan so as to divert all the water to non-riparian lands "except for occasional spills". In other words, it was thought that at times it might be wise to spill water over the Dam so as to leave room for subsequent floods (R., p. 94). This matter was entirely immaterial because we are suing for the right acquired by the defendant to divert all of the water for irrigation of non-riparian lands. Such diversion is obviously entirely disconnected from any aid to navigation or flood control. The gravamen of the action is the storage and diversion of all the water of the river for the irrigation of non-riparian lands. *Such* storage and *such* diversion were in no way in aid of navigation. The Court found that the occasional spills did not constitute an irrigation supply for plaintiffs and the damages to plaintiffs were fixed after giving due consideration to this spill (R., p. 94). It is probable that this modification

was the cause for the statement in H. Com. on Flood Control, Doc. No. 2, 78th Cong., 2d Sess., that part of the cost of Friant may be charged to flood control, but stating that its primary use was for irrigation. This may account for the passage by the Legislature of California in 1943 (eight years after the Government had taken over the Project and two years after the taking found by the Court), of an Act declaring that Friant Dam should be used, among other things, for improvement of navigation (Cal. Statutes, 1943, p. 1747). This declaration made by the State, which did not own the Dam or have any control over it, would not detract from the Federal Plan, which showed that it contemplated the taking of all of the water of the San Joaquin River for irrigation, under which Plan the entire water of the river had been legally taken for the purpose of irrigation in 1941. We submit that these modifications in 1943 and 1944 could not affect the taking which was made in 1941.

Petitioner relies upon certain declarations contained in the Central Valley Project Act passed by the Legislature of California in 1933 (Cal. Stats., 1933, p. 2643), and now codified in the California Water Code. While it is true that that Act did contemplate some use of Friant Dam for navigation and flood control, it is clear that this was due to the fact that it was then contemplated that the water of the Sacramento River might be pumped up the channel of the San Joaquin River with a system of locks which could aid navigation. This is made clear by Bulletin No. 25 of the State Division of Water Re-

sources. This Project for locks was entirely eliminated by the Federal Plan dated November 26, 1935 (see "San Joaquin Pumping System", R., p. 93). The Court also found that later the Government entirely abandoned the Plan to pump the Sacramento River water up the channel of the San Joaquin River and in lieu thereof substituted an artificial canal (R., p. 94).

The Government in connection with its argument as to navigation and flood control construes Finding 49 (R., pp. 103-4) as if it constituted a finding that there was no evidence on the subject, and attempts to argue that the burden of proof was on the plaintiffs. This is not in accordance with the facts. The facts are, as the Court found, that we introduced the Government's own Plan set forth in Findings 32-36 (R. pp. 90-95, Appendix p. i), which showed that the Plan was to take all of the water of the river for irrigation, and we also introduced further evidence that in actual operation substantially all of the river would be taken in 36 out of 48 years and that during the other twelve years the flow would be reduced to a small percentage of the flow that would have occurred in the absence of such dam and diversion works. (Finding 49, R., pp. 103-104.) From this evidence the Court found, as we have already pointed out, that the Plan was to take all the water of the river for the purpose of irrigation. The only matters on which the Court found that no evidence was introduced were (1) what might be the effect of the reduced flow in connection with the deposit of silt in Stockton Harbor or in the channe

between Stockton and Suisun Bay; or (2) as to what might be the effect in the alteration of currents in such harbor and channel as such currents may relate to the safety of navigation; or (3) as to what might be the effect in preventing recurrences of interruption of service in interstate railways and highway traffic by floods. We, having established to the satisfaction of the Court that the plan was to take all of the water of the river for irrigation, it is difficult to see how there was any burden upon the plaintiffs to either prove or disprove these subsidiary matters. The Stockton Harbor and the channel between Stockton and Suisun Bay are both within tidal action, and we cannot see why the plaintiffs should have first proved whether the reduced flow increased or reduced the deposit of silt, or affected or did not affect an alteration of currents, or whether it affected favorably or unfavorably interstate railways or highway traffic. Even if any Congressional declaration could be construed as a declaration that the project was in aid of navigation or flood control, the evidentiary effect of this was sufficiently neutralized by the showing that substantially all of the water of the San Joaquin River was being taken solely for the purpose of irrigation, quite irrespective of whether it benefited or detracted from navigation or flood control. It would seem much more reasonable to hold that if the Government claimed that navigation or flood control were affected in some of the ways suggested in Finding 49, it should have proved that fact.

II.

EVEN IF THE PROJECT WAS TO ANY EXTENT IN AID OF NAVIGATION OR FLOOD CONTROL, IT IS CLEAR FROM BOTH THE STATE AND FEDERAL HISTORY OF THE PROJECT AND THE TERMS OF THE PLAN ITSELF THAT CONGRESS DID NOT INTEND TO RELY UPON THAT FACT TO ENABLE IT TO DESTROY VESTED RIGHTS OF RIPARIAN OWNERS WITHOUT COMPENSATION, BUT ON THE CONTRARY EXPRESSLY PROVIDED FOR COMPENSATION TO THE RIPARIAN OWNERS OF BOTH CULTIVATED LANDS AND GRASSLANDS.

It is well settled that Congress had full power to waive and relinquish any immunity which the United States has to pay compensation due to the navigation or flood control features of the Project.

Henry Ford & Son v. Little Falls Fibre Company, 280 U. S. 369.

In that case a license had been granted by the Federal Power Commission, a Federal Agency, under a direct recital that the acts of petitioner authorized by it "were found by the Commission to be desirable and justified in the public interest for the purpose of improving and developing Hudson River for the benefit of interstate commerce, and that the petitioner, acting under the license, is an agency of the federal government, in the exercise of its power to regulate commerce and navigation". While the Court recognized that state laws affecting the distribution or use of water in navigable waters and the rights derived from those laws may be subordinate to the power of the national government to regulate commerce upon them, still it held it was a reasonable construction of the Act that it was intended that if those rights were

extinguished, compensation should be granted. This was held to be a reasonable conclusion from certain provisions of the Act (1) making the licensee liable for damages occasioned to the property of others, (2) a provision that nothing contained should be construed as affecting or intending to affect the laws of the respective states relating to the control, appropriation and distribution of water (a provision very much like the provision of the Reclamation Act); and (3) the fact that the power of eminent domain was granted. Without in any way detracting from the correctness of the conclusion arrived at, we submit that, in the case at bar, we are not driven to inferences or construction, but we have a direct Act of Congress approving a plan which expressly provided for compensation, and the Federal Agency granted compensation which was appropriated by Congress.

That such immunity was waived is clear from the previous history of the Project, from the terms of the Plan, from the acts of the Department of the Interior making compensation, and the Acts of Congress approving the Plan and appropriating money from which payments were made.

The deliberate and ratifying action of Congress gives the force of law to the prior official action even if unauthorized when taken.

Silas Mason Co. v. Tax Comm., 302 U. S. 186.

This waiver is in line with the attitude of Congress expressed by Section 1(b) of the Flood Control Act of December 22, 1944, 58 Stat. 887, by which Congress expressly provided that the water rights of landown-

ers in the western states based on consumptive uses should be considered superior to the right of the United States to make improvements in aid of navigation under the Flood Control Act.

As we have already pointed out, the Plan authorized by Congress from its very inception provided for making compensation. With respect to three of the cases here involved the Government had contracted to pay Miller & Lux compensation and to pay from an escrow created by it compensation to anyone else showing a better right thereto. It had also paid Miller & Lux in cash close to $2,000,000 for damages to lands of the same type as the lands of plaintiffs. As to the other three cases the judgments merely apply to the lands involved therein the same rate of damages fixed by the government as to the other three cases. The Department of the Interior had made written declaration of the policy of the Government to make compensation (Appendix, p. xvi).

The undisputed facts shown by the record are that the average yearly flow of the San Joaquin River is 1,811,082 acre feet (R., p. 85). Prior to the adoption of the Central Valley Project, 1,458,538 acre feet of this water had been utilized by controlled irrigation (R., p. 84). Besides this, 246,000 acre feet were beneficially used by uncontrolled flow over 82,000 acres of grasslands using three acre feet per acre, or 246,000 acre feet (R., pp. 88-9). This indicates a total beneficial use of 1,705,138 acre feet of water, which is almost equal to the average annual flow of the River. The record shows that this water was used on 285,000

acres of crop lands (R., p. 93) and 250,000 acres of submarginal or grasslands (Appendix, p. viii), making a total area benefited amounting to 535,000 acres of land. The record further shows that the Plan contemplated that the water theretofore used on this acreage would be carried by the Madera Canal to 140,000 acres (Appendix, p. vi) and by the Kern Canal to 1,000,000 acres in the southern part of the Valley (Appendix, p. vi), making 1,140,000 acres to benefit by the water theretofore used by plaintiffs and other irrigators.

This area involved one of the largest irrigated areas in the world. Must it not be assumed that not only the owners of those water rights but the State and Federal Government were solicitous of the rights of that area and framed legislation to protect those rights in order that other areas might be developed? The danger that it might be claimed that the rights might be seized without compensation in view of the alleged navigable character of the River was no secret and therefore a plan was formulated that required compensation, and Congress approved that plan and appropriated money to make such compensation. To now contend that no compensation is due because of the relatively small, if any, effect on navigation or flood control, is to make a contention which Congress would not have countenanced and which it flatly repudiated.

III.

THE ACTS OF THE DEFENDANT IN CLOSING THE DAM AND IMPOUNDING 17,400 ACRE FEET OF WATER IN OCTOBER, 1941, CONSTITUTED A TAKING OF PLAINTIFFS' RIGHTS.

The findings on this subject are found in the record, pages 32 to 37. These acts clearly constituted a taking within the reasonable rule laid down by this Court in *United States v. Dickinson,* 331 U.S. 745. The Government clearly considered that this initial storage constituted a taking, because in its contract with Miller & Lux Incorporated it provided that actions must be brought "prior to the sixth anniversary after the initial storage or diversion of waters of the San Joaquin River by the United States by means of Friant Dam" (R., p. 96).

The fact that both the Bureau and Miller & Lux Incorporated considered the "initial storage" on October 20, 1941, to constitute a taking, is clear from the finding that the contract only authorized deductions therein by the Government where they were authorized by actions commenced "prior to the sixth anniversary after the initial storage" (R., pp. 96-7). Obviously this referred to the six-year period allowed for suing under the Tucker Act. That period runs from the "taking". This definitely fixes the initial storage as the taking.

That the storage of this 17,400 acre feet of water constituted a taking is obvious in view of the fact that under the law of the State the storage of that quantity of water for a public purpose impressed the water of the river to the full capacity of the reservoir

with that public use and deprived the plaintiffs of any right to recover the same.

Collier v. Merced Irrigation District, 213 Cal. 554.

The mere fact that this storage occurred at a period of the year when others than the petitioner might have been entitled to all the water of the river, should not be controlling in determining whether or not there has been a taking. The best interest of the Government itself would be to have its own rights definitely fixed and the rights of everybody cut off by a taking and failure to file suit within the six-year period. Just what effect this water would have on the underground water table or just what effect it might have on the surface would undoubtedly differ as to every piece of land in the flood plain. No one could say whether or not those having prior rights would in fact exercise them, or whether or not the water would in fact flow on down the stream. The fact is that the Government made an invasion upon the river which barred the plaintiffs to object to the storage of water up to the full capacity of the reservoir. Their rights were taken and they had no right after that time to bring any action in law or in equity to recover their property. All they had was an action for compensation.

IV.

THE COURT WAS FULLY JUSTIFIED IN AWARDING INTEREST FROM OCTOBER 20, 1941, TO DATE OF PAYMENT.

The only objection to the allowance of interest is based on the fact that due to war conditions which commenced in December, 1941, the Government was unable to complete its Project and actually use all the water contemplated to be taken by the Project, although as we have already pointed out, it did store 17,400 acre feet in 1941, 302,600 acre feet in 1944 and 430,000 acre feet in 1945 (R., pp. 101-2). The taking in a legal sense being complete on October 20, 1941, the compensation is to be fixed as of that date, and the amount allowed as interest is not interest in the legal sense, but is compensation for delay, for which the Court allowed only 4%. It would be unendurable to have the compensation depend on the actual use rather than on the use which the condemnor was entitled to make. It is well settled that it must be assumed that the condemnor will make the use which it is entitled to make to the extent most injurious to the landowners, and that damages must be fixed on that assumption.

East Bay Municipal Utility District v. City of Lodi, 120 Cal. App. 740, 762.

It should be noted that the contract by which the Bureau set up the escrow was dated July 27, 1939, and provided that Miller & Lux Incorporated should be entitled to interest from the date of the contract. In view of that fact the Government was not injured by an allowance of interest from October 20, 1941 (Appendix, p. xv).

V.

THE FINDINGS AS TO THE RIGHT TAKEN WERE SUFFICIENT.

The petitions alleged the riparian rights of plaintiffs and that the Plan was to take all of the water of the San Joaquin River flowing at Friant for the irrigation of non-riparian lands in certain specified counties (Par. VI, R., p. 2; Par. V, R., p. 19; Par. IV, R., p. 46; Par. V, R., p. 150; Par. IV, R., p. 155, and Par. V, R., p. 158). The Court found that that was what was taken (Finding 32, R., p. 90). The Court also found the depreciation which took place in the value of plaintiffs' land by this taking (Findings 29, R., p. 88; 42, R., p. 188; 46, R., p. 190; 49, R., p. 190; 56, 57, R., p. 110; 63, R., p. 113; 75, R., p. 123; 85, R., p. 127, and 87, R., p. 128). There was therefore no uncertainty as to the right taken.

VI.

THE RULING OF THE COURT OF CLAIMS THAT THE CALIFORNIA CONSTITUTIONAL AMENDMENT IN NO WAY DEPRIVED THE PLAINTIFFS OF THEIR RIGHT TO COMPENSATION FOR DEPRECIATION IN VALUE OF THEIR LAND BY THE TAKING OF ALL THE WATER OF THE RIVER, WAS FULLY JUSTIFIED.

It should be noted that in accordance with the findings in this case the Superior Court of the State of California in an action between Miller & Lux and Madera Irrigation District had held that Miller & Lux had the right to enjoy this high flow of the river (R., pp. 78-81). As three plaintiffs here are successors in

interest of Miller & Lux in the lands of the plaintiffs, and the other three plaintiffs are under contract as to water rights in privity with Miller & Lux, and the Government is successor in interest of the Friant Dam, and the applications for appropriation by Madera Irrigation District (R., pp. 78-9) that adjudication would seem to be *res judicata*. It will be noted that that decision was rendered January 4, 1933, which was five years after the passage of the Constitutional Amendment in question.

The actual effect of the Constitutional Amendment is not yet fully determined by the Courts of California, but the Courts have always pointed out that its meaning and effect will only be determined as numerous cases presenting peculiar facts come before the Court for determination. The most definite thing, we think, that the Courts of California have decided with regard to the Amendment, is that if any use of the river is beneficial, a riparian owner is entitled to make it and is entitled to reasonable compensation if he is deprived of it. The former rule that he was entitled to prevent any diversion or use of the water entirely irrespective of injury is no longer recognized. The Courts also by reason of the Amendment, concluded that the Courts should endeavor to work out some practical physical solution of the various cases and may require changes in methods of diversion or use generally at the expense of those desiring to appropriate the water of the stream. We do not intend to write a treatise on the water law of California and the effect of the Constitutional Amendment in every

possible situation, but will confine ourselves to the question whether the Government was right when it agreed to pay to Miller & Lux Incorporated $511,000 damages to certain grasslands which enjoyed the high flows of the river.[5]

The Court first passed on and upheld the Constitutional Amendment as a reasonable exercise of police power in *Gin S. Chow v. Santa Barbara,* 217 Cal. 673. In that case the trial Court had denied an injunction sought by the riparian owner against the storage of water of the Santa Ynez River, one of the coastal range streams fed by rainfall and not by snow. The defendant did not seek to divert all the water of the stream, but only certain flood waters which were extraordinary flows within the meaning of the case of *Gallatin v. Corning Irrigation District,* 163 Cal. 405, in which the Supreme Court held that such extraordinary flows did not belong to the riparian owner. The Court also found that the water intended to be impounded was in excess of all the water that could be beneficially used by the plaintiff and that no injury would result to the plaintiff by the storage of the floods in question (pp. 694-5). The contention of the plaintiff and appellant was that however small or unsubstantial may be the invasion, it should be enjoined (p. 694). The Court held that whatever might have been the rule prior to the Constitutional Amendment, such was not the rule under that amendment, but that the purpose of the amendment was to con-

[5]This matter will be found considered at some length in Stanford Law Review, Vol. 1, p. 172.

serve the waters of the state "without interference with the beneficial uses to which such waters may be put by the owners of water rights, including riparian owners" (p. 700). In that case the Court held the water "was of no substantial benefit to the riparian owner" (p. 700). The Court pointed out that the amendment was only intended to regulate the right, not to destroy it (p. 703). The effect of the amendment was to limit the riparian owner to "a reasonable benficial use" of water (p. 704). Such reasonable beneficial use depends upon the facts of each case (p. 706) to be determined by the trial Court (p. 706). The reason why the use by the plaintiff was unreasonable was that there was "no substantial or any benefit" to him and "no injury by the taking thereof" (p. 706).

The next case in which the matter came before the Court was *Peabody v. Vallejo,* 2 Cal. (2d) 351. This case was decided by the trial Court, which granted an injunction, before the Supreme Court had passed upon the effect of the Constitutional Amendment. The City of Vallejo only claimed the right to store extraordinary floods (p. 361). The findings of the trial Court were that the flows were not extraordinary and were put to beneficial use. The Supreme Court thought that the case had been decided without regard to the Constitutional Amendment (p. 363). That Court stated the extreme views of the parties, the plaintiff claiming the right to the full flow of the stream without diminution, regardless of the unreasonableness of his uses and regardless of waste or surplus which such uses might entail, and the de-

fendant insisting that plaintiffs were only entitled to the ordinary, as distinguished from flood or freshet, flow. The Court held that neither of these views was in accord with the amendment (p. 365); that the doctrine of reasonable use is the doctrine of the amendment (p. 367). The Court states the general effect of the amendment, and stated that the "problem is to apply these rules in the varying circumstances of cases as they arise" (pp. 367-8). The Court held that the water might be stored "subject to the rights of those who have a lawful priority in a reasonable beneficial use" (p. 368). The Court also held that the distinction between the ordinary and extraordinary floods was no longer applicable (p. 368). The appropriator can only under the amendment appropriate the surplus over the water beneficially used by the riparian owner (p. 368). The Court stated that how the surplus can be used having due regard to riparian rights cannot be determined in one case (p. 369). It held that overflow merely to deposit silt or to remove salt was not within the riparian right even at common law (p. 369). It held that the asserted right to have the flood or freshet water overflow the lands and never return to the stream cannot be supported (p. 369). It should be noted that the Court did not say that the right to have such overflow to irrigate the land was unsupported. In this connection the Court referred to *Montecito Valley Water Company v. Santa Barbara,* 144 Cal. 578, but that was apparently a miscitation, as there seems to be nothing on that subject in that case. The Court held that the right

to maintain the underground level of the water is recognized "but subject to the limitations of the new state policy" (p. 370). This right is to be handled on the same basis as a right of overlying land owners in percolating waters as against an appropriator for distant land, namely, that the appropriator can only take a surplus over the needs of the overlying landowner (p. 371). The right in the underground water is subject to the rule of reasonable use (p. 372). The Court further held that "There is and should be no endeavor to take from a water right the protection to which it is justly entitled. The preferential and paramount rights of the riparian owner * * * are entitled to the protection of the Courts at law or in equity" (p. 374). In a case where injunction was not proper, a declaratory judgment may be entered declaring such rights (p. 374). The Court further held if the appropriative right caused a substantial diminution of the supply, the owner is entitled to compensation for the resulting damage to the land but that the technical infringement of the right is not actionable (p. 374). The Court further said "Any use by an appropriator which causes substantial damage thereto, taking into consideration all the present and reasonably prospective recognized uses is an impairment of the right for which compensation must be made" (pp. 374-5). The right to the pressure of the stream to force water underground is a recognized right (p. 375). The Court is also authorized to make a physical solution so as to make the appropriative right and the right of the riparian owner harmonize

(pp. 380 and 383). The Court also referred to the situation of the town of Suisun which pumped water but only needed .37 of an inch. The Court held that any interference with it was unsubstantial (p. 382).

The next case was *Hillside Water Company v. City of Los Angeles,* 10 Cal. (2d) 677. There the Court upheld the right of a landowner to be compensated for being deprived of the right to have an underground water supply kept at an elevation sufficient to support surface uses, and thus minimize the requirements of surface irrigation. In other words, the Court not only recognized the right of the landowner to protect the flow of the stream, at a high enough elevation to produce an underground water supply which he might pump for irrigation uses, but high enough so that by capillarity it would help to irrigate his land and thus reduce the amount of water which he had to apply on the surface.

In *City of Lodi v. East Bay Municipal Utility District,* 7 Cal. (2d) 316, the Court held that while as against a taking for public use, a prior user may be required to make minor changes in its method of appropriation in order to render available water for subsequent appropriators, it cannot be compelled to make major changes or to incur substantial expense. This was also a case in which the Court required the river to be maintained at a sufficient height so that the water was forced into the gravels so that the landowner could extract it, although this required a large part of the water of the stream to run to the ocean, and it was held that the landowner could not be compelled to expend any large sum of money to lower his pumps.

In *Los Angeles County Flood Control District v. Abbot,* 24 C. A. (2d) 728, the Court held that where it was beneficial to the land to have the water overflow it and deposit sand and gravel upon it, this was a valuable property right which, if invaded, must be compensated for.

The case of *Meridian Ltd. v. The City and County of San Francisco,* 13 Cal. (2d) 424, did not involve any right to the benefit of overflow, the plaintiff's land being cultivated and the amount of water reasonably necessary therefor being proved without dispute. Notwithstanding this, the trial Court enjoined the appropriator from storing water of the stream on the theory that the location of the storage was so far removed from the plaintiff's lands that it would be impossible for the plaintiff to know that the storage was without interference of his rights. In reversing this judgment the Court referred to the scope of the amendment limiting the right of the riparian owner to the amount of water reasonably required, and said that the scope of the amendment can be determined only by a large number of cases presenting different conditions (p. 444). The Court said "that the riparian owner has a prior and paramount right to this use and if necessary is entitled to the full natural flow of the stream" (p. 445). The Court also said that to permit waters to pursue their natural course to the sea is not waste in the constitutional sense (p. 448). The Court said that storage by the Central

Valley Project is a beneficial use within the amendment, but that "such right of storage must necessarily be subordinate to all beneficial uses on the stream made in the exercise of riparian and prior appropriative rights" (pp. 449-50).

In *City of Elsinore v. Temescal Water Company*, 36 C. A. (2d) 116, the Court held that the landowner was entitled to maintain the level of the lake for recreational uses of adjoining land and prevented diversion of the stream which reduced the level of the lake. The use of the full, natural level of the lake for that purpose was held to be reasonable use, and in no way violated the Constitutional Amendment.

In *Williams v. City and County of San Francisco*, 24 C. A. (2d) 630, the Court put special emphasis on this provision of the Constitutional Amendment: "Provided, however, that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of the water of the stream to which his land is riparian under reasonable methods of diversion and use".

In the case at bar the Court finds that this high flow is beneficial, that it produces additional feed and increases the value of the land to the extent of $9.00 per acre.

The Court has not awarded damages for deprivation of the *overflow* but for the deprivation of the *flow* at high stages. In other words both the complaints and the findings and judgments, and the evidence contained in the findings show that all the

riparian rights have been taken. This, however, includes every benefit from the flow of the river. It includes percolation into the land, flow through branch channels on the land, overflow on the land, and the right to use any conceivable methods of artificially placing the water on the land.

Even if under the Constitutional Amendment the Court should say that the owners cannot insist upon the full flow of the stream to overflow the land, still they could insist upon a sufficient amount of water to reach their land at such stages so that they might by means deemed reasonable pump or otherwise place the water on the land. But this is made impossible by the act of the Government in taking all the water of the river. Under such circumstances no physical solution of the conflict is possible. Naturally the landowner has enjoyed the overflow as long as it has been available. If under the police power the overflow can be prevented by structures such as levees, or by storage, that can only be done by leaving in the stream a sufficient quantity to serve the plaintiffs when the water is diverted by reasonable methods of diversion and use.

VII.

THE COURT OF CLAIMS DID NOT MISINTERPRET THE EXCEPTIONS AND RESERVATIONS CONTAINED IN THE POTTER, ERRECA AND GERLACH LIVE STOCK COMPANY DEEDS.

The Government in effect construes these deeds so as entirely to destroy any riparian rights in the land.

whereas it is clear that all that the grantor, Miller & Lux Incorporated, was attempting to do, was to preserve as superior its own water rights and the right to dispose of them to the Government or anyone else, and also to preserve the storage rights which it had granted to power companies. This will be made clear by the provisions of each of these deeds.

Potter deed.

The deed to J. Sheldon Potter is found in finding 51 (R., p. 106) and it will be seen that by it this land was made subject to certain "existing water rights" of Miller & Lux Incorporated and its subsidiaries "whether established by appropriation, prescription, or existing contract." Of course to make a certain piece of land subject to other rights does not take away all of the rights of such land but merely subordinates them to certain existing rights. In other words, it does nothing more than fix priority, leaving the land granted to enjoy the surplus after the other rights are supplied. The deed also reserves "the right of the Southern California Edison Company, Ltd. and the San Joaquin Light & Power Corporation to store the water of the San Joaquin River under existing contracts with the Grantor." The general effect of these contracts is stated in finding 14 (R., p. 77), and the surplus water found to exist for plaintiffs gave full effect to the change in the river flow by the power storage. The deed also reserved to Miller & Lux Incorporated and its subsidiaries the right to sell and convey any water right already established in it or them by appropriation or prescription and to

change the place of use of that water and to store the same. This of course did not in any way increase a water right which had already been made superior to the rights of the Grantee, and in no way affected the right of the plaintiff to any water in excess of the water already acquired by appropriation or prescription.

This is made still more clear by the fact that before this deed was executed Potter was asked to take a deed in which the grantor reserved "the right to store and impound at any point or points above the land herein conveyed all or any part of the water flowing in the San Joaquin River, or any of its tributaries", and also reserved "the right to take and divert at any point or points above the land herein conveyed all or any part of the waters of said river and its tributaries", and also the right to "use such waters for the irrigation of riparian or nonriparian lands within or without the water shed of said river." (R., p. 107.) The fact that the plaintiff refused such a conveyance and insisted on a conveyance only subjecting his land to the prior rights of the grantor by appropriation, prescription or existing contract, shows clearly that there was no intent of the parties to denude these lands of riparian rights.

Erreca deed.

The exceptions in the deed to the plaintiff Martin Erreca are found in finding 59. (R., p. 111.) That deed expressly provided "that the riparian rights of the land herein conveyed shall always remain." This certainly negatives any intent to separate the ripar-

ian rights from the land. The deed further provided that such rights should "be exercised subject and subordinate to the water rights of the grantor * * * whether such water rights be riparian, appropriate, or prescriptive." This again only limited, or rather subordinated, the land granted to the water rights already existing in the lands of the grantor, but certainly those rights were only rights to use such quantity of water as was required for beneficial use on the lands of the grantor, and did not amount to an absolute ownership of the entire river, and the reservation of those rights in no way affected the right of the grantee in the surplus water of the river. The deed further contained the provision "to the end that the grantor, its successors, subsidiary, and affiliated companies, may use, enjoy and transfer *said water rights,* including the *right* to contract for or permit storage on the upper reaches of the San Joaquin River, without let or hindrance from the grantee, his heirs, and assigns". A reasonable construction of this latter clause is that all that was reserved was the right to transfer the rights of the grantor as a riparian owner, appropriator, or by prescription, to use the water to the extent that it was appropriated or beneficially used, and that the contracts which it had made with the power companies should be respected. However, the parties thought that there might be some misconstruction of this provision and that it might be construed in a broader manner, and therefore the deed provided: "This covenant and condition shall not be construed as an extinguishment of the riparian rights of the land herein conveyed, but as an estoppel in

favor of the Grantor, its successors, subsidiary, and affiliated companies, against the Grantee, his heirs and assigns, *to the extent herein provided"*. This made it clear that the reservation was a limited one and merely subjected or subordinated the land granted to the fixed rights of the grantor, and was not to be construed as an extinguishment of riparian rights of the lands conveyed, or as in any way taking away the rights of the land to enjoy the surplus water of the river.

Gerlach deed.

The exception in the deed to the predecessor of Gerlach Livestock Company is found in finding 79. (R., p. 125.) This deed provided "This conveyance is made on condition that the riparian rights of the land herein conveyed shall always remain". This was certainly inconsistent with the thought that the riparian right was to be destroyed and reserved. It is further provided that this right shall "be exercised subject and subordinate to the water rights of the grantor, its successors, subsidiary, and affiliated companies (including mutual water companies in which grantor owns stock), whether such water right be riparian, appropriative or prescriptive". This was clearly a limited reservation of existing water rights of the grantor and its subsidiaries, whether that right was riparian, appropriative, or prescriptive, and it is clear that this had reference to such rights as the grantor had in lands other than the land granted. This was declared to be "to the end that the grantor, its successors, subsidiary, and affiliated companies,

may use, enjoy, and transfer said water rights, including the right to contract for or permit storage on the upper reaches of the San Joaquin River, without let or hindrance from the grantee, his heirs, and assigns". This we submit only reserved the right of the grantor with respect to other lands and to use, enjoy and transfer the same, including the right that it had already exercised of contracting for permitting the storage of water for power on the upper reaches of the San Joaquin River. However, here again the parties apparently feared that a broader meaning might be attached to these words, and it was therefore provided "This covenant and conditions shall not be construed as an extinguishment of the riparian rights of the land herein conveyed, but as an estoppel in favor of the grantor, its successors, subsidiary, and affiliated companies, against the grantee, his heirs, and assigns *to the extent herein provided.*"

In construing these instruments there is a marked difference to be observed between a reservation of "water *rights*" and a provision reserving all the water of the river. It is possible for the owner of land, by grant, entirely to deed away all right to the water of the river and thus denude the land of any right therein. We may assume that the same thing can be done by a reservation in a grant of the land. In other words, the owner of the land, in granting it, could provide that he was not granting any right of the land in the water of the river. In that manner any right of the land to the water of the stream could be separated from the land. How easy it would have been to have done that in all of these deeds containing these conditions, exceptions and reservations if that

was what was intended. The mere fact that they all preserved a riparian right in the land and meticulously endeavored to make only limited and restricted reservations, clearly indicates that all that was intended was that the land was subordinated to the existing water rights of the grantor with respect to other lands, and that those rights might not only be enjoyed, but they might be transferred to others and used for other purposes.

Finding 72 (R., p. 122) makes it plain that the true intent of the reservations was to preserve the existing rights of Miller & Lux and not to "reserve" the claim of the Government to take all the water of the river.

With regard to the reservations in the Martin Erreca and Gerlach Live Stock Company deeds, our position was and is that the clause "including the right to contract for or permit storage on the upper reaches of the San Joaquin River, without let or hindrance from the grantee, his heirs, and assigns", clearly related only to *existing* rights under which Miller & Lux had contracted for such storage with certain power companies. We think that from the language of the entire instruments it is clear that nothing was reserved except existing rights. This also follows from Finding 72 (R., p. 122). However, the Court of Claims did not deem it necessary to determine that question, since the clause only permitted *storage* and did not permit *diversion*, and the Court of Claims felt that the real damage was done by the diversion rather than by the storage (R., pp. 137-8). This no doubt is based on the theory that storage might be permissible provided sufficient water was

supplied to irrigate plaintiffs' lands under reasonable methods of diversion and use. If this Court does not agree with the decision of the Court of Claims that the real damage done to the plaintiffs was not by the storage, but by the diversion, then we submit that this right of storage contained in the reservation should be limited to existing rights of storage under the contracts with the power companies. In this connection we think it well settled that a reservation of this kind should be limited to existing rights.

Barataria v. Ott, 84 Miss. 737, 37 South. 121;
Dyer v. Sanford, 9 Metc. 395, 43 Am. Dec. 399;
Hill v. Cutting, 107 Mass. 596;
Village of Terrace Park, et al. v. Errett, 12 F. (2d) 240;
Chidester, et al. v. City of Newark, et al., 31 F. Supp. 892;
Mott v. Nardo, 73 C. A. (2d) 159, 166 P. (2d) 37;
Powell v. Big Horn Low Line Ditch Co., 81 Mont. 430, 263 Pac. 692.

We respectfully submit that the judgments should be affirmed.

Dated, San Francisco, California,
February 4, 1949.

EDWARD F. TREADWELL,
REGINALD S. LAUGHLIN,
Attorneys for Respondents.

(Appendix Follows.)

Index to Appendix

		Page
A.	Plan of the Central Valley Project.....	i
B.	Contract for purchase of Miller & Lux water rights dated July 27, 1939.....	xi
C.	Letter June 22, 1939, from John C. Page, Commissioner, to Mr. Walker R. Young.....	xvi

Appendix

A.

PLAN OF THE CENTRAL VALLEY PROJECT EMBODIED IN RIVERS AND HARBORS DOCUMENT NUMBERED 35, SEVENTY-THIRD CONGRESS AUTHORIZED BY SECTION 2 OF THE RIVERS & HARBORS ACT OF AUGUST 26, 1937 (50 STAT. 844, 850), SET FORTH ON PAGE 4 OF THE PETITION FOR WRITS OF CERTIORARI HEREIN.

The Secretary of the Interior
Washington

November 26, 1935

The President,
The White House.

My dear Mr. President:

The Supreme Court of the United States in the Parker Dam decision (United States v. State of Arizona, 295 U.S. 174) indicated that Section 4 of the Act of June 25, 1910 (36 Stat. 835), is applicable to irrigation projects constructed under the National Industrial Recovery Act and this report on the Central Valley project, California, is made to you under said statute of 1910 and under subsection B of Section 4 of the Act of December 5, 1924 (43 Stat. 702).

Section 4 of the Act of June 25, 1910 (36 Stat. 835), provides, in effect, that after the date of that act no irrigation project to be constructed under the Act of June 17, 1902 (32 Stat. 388), and acts amendatory thereof or supplementary thereto, shall be undertaken unless and until the project shall have been recommended by the Secretary of the Interior and approved by the direct order of the President.

Subsection B, Section 4, Act of December 5, 1924 (43 Stat. 702), provides as follows:

> "That no new project or new division of a project shall be approved for construction or estimates submitted therefor by the Secretary until information in detail shall be secured by him concerning the water supply, the engineering features, the cost of construction, land prices and the probable cost of development, and he shall have made a finding in writing that it is feasible, that it is adaptable for actual settlement and farm homes, and that it will probably return the cost thereof to the United States."

General Description of Project.

The Central Valley project embodies a plan for the conservation, regulation, distribution and utilization of the water resources of the Sacramento and San Joaquin rivers to provide urgently needed water supplies for existing agricultural, industrial and municipal developments in the Sacramento and San Joaquin valleys and upper San Francisco Bay region which contain 3,000,000 acres of settled irrigated and productive land, and a population of 900,000 persons. In addition to providing new water supplies to meet serious problems of water shortage, the project contemplates the restoration of commercial navigation on the upper Sacramento River, increased flood protection for the valley lands, and incidentally the generation of about a billion and a half kilowatt hours annually of hydroelectric energy.

The key unit of the project is Kennett Reservoir on the Sacramento River. A dam 420 feet high will

regulate floods and store three million acre-feet of water. Water released from the reservoir, after generating hydroelectric power, will flow down the Sacramento River, maintaining adequate depths for navigation and furnishing ample supplies for irrigation, municipal and industrial use along the main river and in the fertile delta region of the Sacramento and San Joaquin rivers. Intrusion of salt water from the bay into the delta channels—a frequent occurrence in recent years causing substantial loss in crops and threatening destruction of productivity—will be prevented by the released waters. In addition, water supplies will be made available in the delta channels for various uses in the nearby upper San Francisco Bay area, and for utilization in the San Joaquin Valley. Conduits to carry the supplies to these areas are provided. The supply for the San Joaquin Valley will be conveyed up the San Joaquin River through a series of pumping plants and intervening natural and artificial channels a distance of 150 miles lifting the water to an elevation of 160 feet above sea level. This water will replace San Joaquin River water now used for irrigation in the northern San Joaquin Valley, thus permitting the entire flow of the San Joaquin River to be regulated in Friant Reservoir—the second storage unit of the project—and to be utilized in the southern San Joaquin Valley where local supplies are deficient. Water from this reservoir will be delivered by gravity through conduits extending northerly and southerly to serve developed irrigated lands in an area extending from Madera County on the north to Kern County on the south.

The cost of the project, estimated at $170,000,000, will be met by revenues from the sale of water and power.

Water Supply.

The sources of water supply for the project are the Sacramento and San Joaquin Rivers and their tributaries. The State of California, pursuant to acts of the State Legislature has filed notices of appropriation on the principal streams, which are in good standing. Water supplies studies made by the Department of Public Works of California, U. S. War Department and the U. S. Bureau of Reclamation, indicate on the basis of available data that the works of the project will provide an adequate water supply for all purposes.

Engineering Features.

The principal engineering features of the project are as follows:

Kennett Dam Unit—The Kennett reservoir, the key unit of the project, is located in the Sacramento River near Redding in Shasta County. The dam will be 420 feet high and store 3,000,000 acre-feet of water. A 175,000 k.v.a. power plant will be located below the dam. A reregulating afterbay with a 50,000 k.v.a. power plant will be constructed below the Kennett dam. From the power plants a 200 mile power transmission line will extend to a main distributing substation near Antioch on Suisun Bay.

Contra Costa Conduit—A canal, capacity 120 second feet, with pumping plants, will extend westerly from the San Joaquin delta for 50 miles through Contra Costa County to supply municipal, industrial and agricultural water requirements.

San Joaquin Pumping System—The works for this pumping system will comprise a dam and other works in Sacramento delta to divert stored water from Kennett reservoir through a channel into San Joaquin delta for salinity control, irrigation and other purposes; dredging of existing channels in the San Joaquin delta; five dams and pumping plants on San Joaquin River to mouth of Merced River; and four pumping plants and 65 miles of canal on the westerly side of San Joaquin Valley which will deliver water to Mendota Weir on San Joaquin River, elevation 160 feet. These works will be capable of furnishing a substituted supply of 1,000,000 acre-feet to 285,000 acres of land now irrigated from San Joaquin River.

Friant Reservoir—A dam, 250 feet high, will be constructed on San Joaquin River, which will store 400,000 acre-feet of water which will permit the diversion of San Joaquin River water southward at elevation 467 feet. One and one-half million acre-feet annually on the average will be available for transmission from the reservoir through the means of the San Joaquin River Pumping System and the purchase of water rights in the San Joaquin River.

Friant-Kern Canal—The Friant-Kern Canal will extend from Friant Reservoir to Kern River, a distance of 157 miles and will be capable of serving an area of 1,000,000 acres of developed land.

Madera Canal—The Madera Canal, maximum capacity 1500 second-feet, will extend from Friant reservoir to Chowchilla River, a distance of 35 miles and will be capable of furnishing irrigation water to an area of 140,000 acres.

Estimated Cost of Project.

Kennett dam, reservoir and power plants	$ 84,000,000
Kennett transmission line and substation	14,000,000
Contra Costa Conduit	2,500,000
San Joaquin Pumping System	19,000,000
Friant dam and reservoir	14,000,000
Friant-Kern Canal	26,000,000
Madera Canal	3,000,000
Rights of way, water rights and general expenses	8,000,000
Total	$170,000,000

First Year Construction Program.

Under date of September 10, 1935, you approved an allocation of $20,000,000 for the Central Valley Project, which amount was later reduced to $15,000,000. Construction on the following units is recommended for the first year:

Kennett Reservoir Unit
Contra Costa Conduit
Friant Dam and Canals.

An amount of $15,000,000 can be efficiently and economically expended on the foregoing units during the first year of construction.

Adaptability of Land for Irrigation, Crop Production and Settlement.

The climate is favorable and the soil, if water is available, is adaptable to the production of a wide variety of crops. The principal crops now raised in the San Joaquin Valley are citrus and deciduous fruits, grapes, alfalfa, cotton, nuts, and figs; in the Delta, asparagus, celery, potatoes as well as deciduous fruits; and in the Sacramento Valley there is a heavy production of rice in addition to other grains and deciduous fruits.

The valley is highly developed. The lands are of high value and produce large returns. With an attractive climate, fertile soil and stable markets, water is the one remaining necessity to prosperous, successful agricultural industry. It has been highly successful and supports a large farm population. Much of the fruit is shipped to eastern markets but many other items, such as the products of dairying, are marketed within the state and reduce the quantities imported into the state. Products are largely non-competitive with other sections of the country, since many of them, such as nuts, figs, raisins, asparagus, are produced almost wholly in California.

Transportation facilities are excellent. These include railroads and improved highways leading to the Metropolitan center of Los Angeles and San Francisco and to eastern markets.

The project is not designed for bringing new lands into cultivation, but for the maintenance of existing agricultural development and existing civilization of

a high type. Any increase in irrigated land will be small and will come into being slowly over a long period of time. Part of the water supply is to be obtained by the purchase of water now used for the irrigation of pasture lands and this will result in the retirement from use of 250,000 acres of submarginal land, as compared to a small and gradual increase of irrigated land.

Social and Economic Values.

The economic values of the project are of great magnitude. The project will not bring into production new agricultural areas but will maintain present values and civilization. Of the 3,000,000 acres now irrigated, 1,000,000 face acute water shortage, and abandonment is proceeding rapidly. The values in jeopardy are large, as without water, not only will lands dry up, but communities will vanish and whole sections return to desert, as is now occurring in the San Joaquin valley. A share of the loss will be suffered by persons not residing in the areas directly affected.

Control of salinity in the delta of the two rivers near Sacramento is part of the agricultural maintenance phase of the project. Here 400,000 irrigated acres with an annual crop value of $30,000,000 are menaced by salt water from upper San Francisco Bay. Some abandonment has occurred and the whole area is endangered. In this same general area is a large industrial section which is also short of water by reason of increasing salinity. Here 100 industrial plants

produce annually $100,000,000 value of manufactured products, and while not facing extinction, are suffering damage and expense from lack of water.

Navigation on the Sacramento River, one of the important waterways of the nation, has been greatly damaged by low water, navigation having been practically abandoned above Sacramento in the summer season. The national navigation and flood values of the project have been found by the War Department to be $12,000,000, and the recently enacted Rivers and Harbors Bill (Public No. 409, 74th Congress), by reference to the War Department report approves the project and authorizes the appropriation of $12,000,000 for it.

A large power house at the main storage dam will produce nearly a billion and a half kilowatt hours of electric energy annually, which will be sold at less than existing rates, thereby benefiting power users and at the same time producing a large revenue, which will go toward the repayment of the construction costs.

Probable Return to Reclamation Fund Of Cost of Construction.

The next declaration required is that the cost of construction will probably be returned to the Federal Government. This is interpreted to mean that it will be returned within forty years from the time the Secretary issues public notice that water is available from the project works. The estimated cost of construction is $170,000,000 and the annual cost, includ-

ing repayment of all other charges is $7,500,000. It is estimated that annual revenues from the sale of water and of electric power will be sufficient to cover these charges. The favorable conditions heretofore recited justify the belief that the project will return its cost.

I find that the project is feasible from engineering, agricultural and financial standpoints, that it is adaptable for settlement and farm homes, that the estimated construction cost is adequate and that the anticipated revenues will be sufficient to return the cost to the United States.

The Commissioner of Reclamation has approved and recommended the construction of the project. I therefore recommend the approval of the Central Valley development as a Federal reclamation project.

Sincerely yours,

(Sgd.) Harold L. Ickes,

Secretary of the Interior.

Approved: Dec. 2, 1935.

Franklin D. Roosevelt,

President.

B.

PORTIONS OF CONTRACT FOR PURCHASE OF MILLER & LUX WATER RIGHTS DATED JULY 27, 1939.

"Payment of Purchase Price and Conveyance of Properties.

"13. The Vendors shall, within fifteen (15) days after notice of the execution of this contract by the United States, execute and deliver to the United States a deed, in the form annexed hereto and marked Exhibit "A", duly executed and acknowledged by the Vendors, conveying to the United States all of the property and property rights herein agreed to be conveyed, together with a deed of reconveyance from The Bank of California, N. A., as Trustee, wherein and whereby said Trustee shall reconvey to Miller & Lux, Incorporated, a corporation, all of the water rights, or rights to the use of water, and other rights or properties, herein agreed to be transferred and conveyed to the United States, free and clear of the lien of that certain Trust Indenture dated the first day of October, 1925, wherein Miller & Lux, Incorporated was Trustor and the said The Bank of California, N. A. was Trustee. The United States shall purchase said water rights, or rights to the use of water, and other rights and properties herein agreed to be coveyed on the terms herein expressed, and upon execution and delivery of said deed and said deed of reconveyance, it shall cause to be paid to the Vendors as full purchase price and full payment for all damages for taking possession of said rights and for entry upon said property, and damages resulting from the construction,

operation and maintenance of said Friant Dam and other works to utilize such rights, the sum of two million, four hundred and fifty thousand dollars ($2,450,000.00), of which sum $1,938,650.00 shall be paid to Vendors and $511,350.00 thereof shall be deposited in escrow, within the period as hereinafter in Subdivision (e) of Article 14 of this contract provided."

* * * * * * * *

"(e) Of the sum of $2,450,000.00, payable to Vendors as provided by this Contract, the sum of $1,938,650.00 shall be paid unconditionally within sixty days after the delivery of the deed as provided by this Contract. The remainder of said sum, to-wit, $511,350.00, shall within said period of sixty days be deposited with such escrow agent as may be selected by the Secretary of the Interior, to be then invested by said escrow agent, at current open market prices, in such Federal securities as may be agreed on between the Secretary of the Interior and the Vendors, and thereafter said securities shall be held in escrow on the terms and conditions herein provided.

"There is delivered herewith to each of the parties hereto, and as part of this Contract, a duplicate original of a map marked Exhibit "B" and entitled "Bureau of Reclamation, United States Department of the Interior, Central Valley Project—Map showing grass lands and riparian lands basic to contract between the United States, and Miller & Lux, Inc. and Gravelly Ford Canal Company, dated July 27, 1939" and identified by the signatures of the respective parties hereto, upon which are delineated certain lands

in this contract referred to as "Grass Lands" and as "Riparian Lands". The boundaries of said Grass Lands are outlined in green and the boundaries of the Riparian Lands are outlined in orange. Said map need not be recorded.

"In the event final judgments are entered by a court of competent jurisdiction in actions at law or suits in equity initiated prior to the sixth anniversary after the initial storage or diversion of said waters of the San Joaquin River by the United States by means of Friant Dam, diversion works, or other works, wherein it is adjudged that the owners of the lands, or any of them, described in said Exhibit "B", are by reason of such storage or diversion deprived of water which they are lawfully entitled to use on said lands, and the United States makes compensation therefor, then the United States shall be paid out of said escrow an amount equal to the damage per acre for each acre of said land adjudicated by such judgment to be so deprived of water, but not to exceed $9.00 per acre for said riparian lands and $13.00 per acre for said grass lands.

"In the event final judgments or decrees are entered by a court of competent jurisdiction, in suits initiated within the period last above described, wherein the United States or its officers, agents, or employees, by reason of a paramount right as against it to the use of any of said waters on said lands, or any of them, delineated on said Exhibit "B", are permanently enjoined from impounding or diverting any of said waters by said means, then the United States shall

be paid out of said escrow an amount equal to $9.00 per acre for each acre of said riparian lands and $13.00 per acre for each acre of said grass lands, which by said judgments are decreed to be entitled to receive such water from the San Joaquin River; provided, that the total obligation of Vendors under this Subdivision (e) of Article 14 shall not exceed but shall be limited to the principal of funds or securities so escrowed, exclusive of costs incidental to said escrow.

"IT IS AGREED AND UNDERSTOOD that there shall be no payment out of said escrow as the result of final judgments or decrees entered by the consent of the United States, or as the result of failure by the United States to defend said actions or to appeal said actions, unless said judgments or decrees are entered or permitted to be entered with the consent of the Vendors.

"No part of the escrow fund herein provided for shall be used to pay costs, expenses, or attorneys' fees incurred in defense of said suits and actions referred to in this subdivision (e) of Article 14, it being understood and agreed that the United States and Vendors shall each pay its costs, expenses and attorneys' fees, if any, incurred in said litigation.

"Payment out of the escrow shall be made annually at or within thirty days after the end of each calendar year, each payment to cover all final judgments or decrees as above described entered during each said year. Payment shall be made by the delivery by the escrow agent to the Secretary of the Interior, or his

authorized representative, of securities equal to the amount then owing to the United States, or as near thereto as possible considering the basic units of the securities in escrow. For this purpose, securities delivered shall be valued at the current market values thereof.

"When final judgments in all suits above described have been entered and payment therefor made as herein provided, or such suits have been finally dismissed, the balance of securities remaining in the hands of the escrow agent shall be delivered to the Vendors. Final adjustment shall then also be made to cover discrepancies between amounts actually owing to the United States hereunder, and amounts actually paid by the periodic delivery of securities.

"Interest accrued on securities remaining in escrow on any interest maturity date shall become the property of the Vendors, and the escrow agent shall at such times deliver the matured coupons to the Vendors. The costs of the escrow shall be borne by the Vendors.

"The escrow agent shall reinvest the principal of escrowed securities that mature or are retired during the life of the escrow, in such Federal securities as are designated by the parties hereto."

C.

United States
Department of the Interior
Bureau of Reclamation
Washington

June 22, 1939

Office of the Commissioner
Mr. Walker R. Young
Supervising Engineer, U. S. Bureau of Reclamation
Old Post Office Building,
Sacramento, California,

Dear Mr. Young:

It has come to my attention that there has been some apprehension among landowners along the San Joaquin River between Friant and Gravelly Ford concerning the effect upon their lands through construction of Friant Dam.

The policy of the Government is to compensate equitably those whose property rights will be adversely affected as a result of the construction of Friant Dam.

The investigations now being made by the Bureau of Reclamation are intended to determine the effect Friant Dam will have on these properties in order that damages may be ascertained and compensation made before such damages actually occur.

You may assure the landowners that if and when our investigations determine the extent to which their

property rights will be invaded, appropriate action will be taken.

Very truly yours,

(Sgd.) John C. Page

Commissioner.